

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

VINCENT TRAN,

09-CV-692-BR

Plaintiff,

OPINION AND ORDER

v.

TYCO ELECTRONICS CORPORATION  
dba PRECISION INTERCONNECT,

Defendant.

VINCENT TRAN  
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Portland, OR 97233  
(503) 760-3833

Plaintiff, *Pro Se*

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Attorneys for Defendant

**BROWN, Judge.**

This matter comes before the Court on Defendant Tyco Electronics Corporation dba Precision Interconnect's Motion (#6) to Dismiss Plaintiff's Amended Complaint Pursuant to FRCP 12(b)(6) and 12(f) and Request for Attorneys' Fees and Injunctive Relief. For the reasons that follow, the Court **GRANTS in part** and **DENIES in part** Tyco/Precision's Motion.

**BACKGROUND**

Plaintiff Vincent Tran is a 41-year-old Vietnamese man who is missing most of his left arm from the elbow down. In 1992 Precision Interconnect hired Plaintiff as a Senior CAD Operator. In 1996 Precision Interconnect promoted Plaintiff to the position of Design/Drafter. In 1999 Precision Interconnect was acquired by Tyco Healthcare. On April 23, 2008, Plaintiff resigned his employment with Tyco/Precision.

Plaintiff has brought two earlier cases against Tyco Electronics Corporation dba Precision Instrument. The Court dismissed both matters in 2008. Both of the earlier cases

alleged claims arising from Plaintiff's employment with Tyco/Precision similar to those claims raised by Plaintiff in the case now before the Court.

**I. Case No. 06-CV-1810-BR**

On May 4, 2006, Plaintiff filed a complaint simultaneously with the Oregon Bureau of Labor and Industries (BOLI) and the Equal Employment Opportunity Commission (EEOC) alleging race and/or national origin discrimination.

On December 19, 2006, Plaintiff filed a Complaint in this Court seeking damages on the grounds that Tyco/Precision violated (1) Title VII, 42 U.S.C. § 2000e-2(m); (2) 42 U.S.C. § 1981; and (3) Oregon Revised Statute § 659A.030 when it demoted Plaintiff. Plaintiff also alleged a claim for intentional infliction of emotional distress (IIED) based on his demotion.

On January 29, 2007, Tyco/Precision filed a Motion to Dismiss Plaintiff's claims for violation of Title VII and Oregon Revised Statute § 659A.030 as untimely and to dismiss Plaintiff's claim for intentional infliction of emotional distress for failure to state a claim.

On April 24, 2007, the Court issued an Opinion and Order granting Tyco/Precision's Motion on the grounds that (1) Plaintiff's Title VII claim was untimely, (2) Plaintiff's § 659A.030 claim was untimely, and (3) Plaintiff failed to state a claim for intentional infliction of emotional distress.

Because Plaintiff appeared *pro se*, the Court granted Plaintiff leave to amend his Complaint to attempt to cure the deficiencies identified in the Court's Opinion and Order.

On July 31, 2007, Plaintiff filed an Amended Complaint in which he again alleged Tyco/Precision violated (1) Title VII, 42 U.S.C. § 2000e-2(m); (2) 42 U.S.C. § 1981; and (3) Oregon Revised Statute § 659A.030 when it changed Plaintiff's job title, did not select him for the Design Drafter or Drafter positions, included the months of October-January in his FY 2005 performance evaluation, and changed his work duties. Plaintiff also alleged claims for IIED and negligent infliction of emotional distress (NIED) as well as a claim for fraud.

On August 17, 2007, Tyco/Precision filed a Motion to Dismiss Plaintiff's claims for fraud and violations of Title VII and Oregon Revised Statute § 659A.030 as untimely and to dismiss Plaintiff's claims for IIED and NEID for failure to state a claim.

On December 7, 2007, the Court issued an Opinion and Order in which it granted Tyco/Precision's Motion to Dismiss.

On May 27, 2008, Tyco/Precision moved for summary judgment as to Plaintiff's remaining claims. On September 25, 2008, the Court issued an Opinion and Order granting Tyco/Precision's Motion for Summary Judgment and entered a Judgment dismissing the matter with prejudice.

Although Plaintiff appealed the dismissal of this action, the Ninth Circuit dismissed the appeal for lack of prosecution in May 2009.

## **II. Case No. 07-CV-953-BR**

On June 28, 2007, Plaintiff filed a Complaint in this Court in which he alleged Tyco/Precision violated Oregon Revised Statute § 659A.030(1)(f) when it retaliated against Plaintiff for resisting unlawful discrimination based on his race, age, or national origin.

On July 11, 2007, Plaintiff filed an Amended Complaint in that action in which he alleged Tyco/Precision (1) violated Oregon Revised Statute § 659A.030(1)(f) by retaliating against Plaintiff for resisting discriminatory treatment based on his race, age, or national origin and (2) violated Title VII, 42 U.S.C. §§ 2000e-2 and 2000e-3, by retaliating against Plaintiff for filing a BOLI complaint.

On September 28, 2007, Plaintiff filed a second Amended Complaint in which he alleged Tyco/Precision (1) discriminated against Plaintiff on the basis of his race, color, and/or national origin in violation of Title VII, 42 U.S.C. § 2000e-2(m); (2) discriminated against Plaintiff on the basis of his race in violation of 42 U.S.C. § 1981; (3) discriminated against Plaintiff on the basis of his race, color, and/or national origin in violation of Oregon Revised Statute § 659A.030;

(4) intentionally and negligently inflicted emotional distress;  
(5) committed fraud; and (6) violated Title VII, 42 U.S.C.  
§§ 2000e-2 and 2000e-3, by retaliating against Plaintiff because  
he filed a BOLI complaint.

On January 22, 2008, the Court entered an Opinion and Order  
in which it granted Tyco/Precision's Motion to Dismiss  
Plaintiff's claims for intentional and negligent infliction of  
emotional distress and fraud.

On February 14, 2008, Plaintiff filed a third Amended  
Complaint in which he alleged Tyco/Precision discriminated  
against him on the basis of his national origin in violation of  
Title VII, 42 U.S.C. § 2000e-2; 42 U.S.C. § 1981; and Oregon  
Revised Statute § 659A.030. Plaintiff also alleged  
Tyco/Precision retaliated against him for filing a BOLI complaint  
and Case No. 06-CV-1810-BR.

On May 27, 2008, Tyco/Precision filed a Motion for Summary  
Judgment as to all of Plaintiff's claims.

On September 29, 2008, the Court issued an Opinion and Order  
in which it granted Tyco/Precision's Motion for Summary Judgment  
and entered a Judgment dismissing the matter with prejudice.

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the Ninth Circuit also dismissed the appeal for lack of  
prosecution in May 2009.

**III. The present action (09-CV-692-BR).**

In May 2008 Plaintiff filed a complaint with BOLI in which he alleged "unlawful employment discrimination based on race/color, and/or whistleblowing, and/or retaliation for opposing unlawful employment practices."

On June 18, 2009, Plaintiff filed a Complaint in this action, 09-CV-692-BR, in which he alleged Tyco/Precision discriminated against him in violation of 42 U.S.C. § 1981; Title VII, 42 U.S.C. § 2000(e)(2); and (3) Oregon Revised Statute § 659A.030 on the basis of his race, color, and/or national origin and in retaliation for filing his previous actions and complaints with BOLI.

On July 27, 2009, Plaintiff filed an Amended Complaint in which he alleges Tyco/Precision discriminated against him in violation of 42 U.S.C. § 1981; Title VII; and Oregon Revised Statute § 659A.030 on the basis of his race, color, and/or national origin and in retaliation for filing his previous actions and for complaining to BOLI. Plaintiff also alleges Tyco/Precision discriminated against him in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1); the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a); and (3) Oregon Revised Statute § 659A.112(1). Finally, Plaintiff alleges Tyco/Precision unlawfully constructively discharged him on April 23, 2008.

On August 11, 2009, Tyco/Precision filed a Motion to Dismiss in which it seeks an order dismissing all of Plaintiff's claims on the grounds that they are barred by claim preclusion, Plaintiff failed to exhaust his administrative remedies, and/or Plaintiff's claims are time-barred. Tyco/Precision also seeks attorneys' fees and an order enjoining Plaintiff from filing any further actions based on his employment with Tyco/Precision.

### STANDARD

Dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is proper only if the pleadings fail to allege enough facts so as to demonstrate a plausible entitlement to relief. *Bell Atlantic v. Twombly*, 550 U.S. 544, 555-56 (2007).

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

*Id.* at 1964-65. In making this determination, the court must accept all allegations of material fact as true and construe the allegations in the light most favorable to the nonmoving party. *Abagninin v. AMVAC Chem. Corp.* 545 F.3d 733, 737 (9<sup>th</sup> Cir. 2008).



In actions involving plaintiffs proceeding *pro se*, the court construes the pleadings liberally and affords the plaintiff the benefit of any doubt. *Aguasin v. Mukasey*, No. 05-70521, 2008 WL 4750618, at \*1 (9<sup>th</sup> Cir. Oct. 30, 2008)(citing *Agyeman v. I.N.S.*, 296 F.3d 871, 878 (9<sup>th</sup> Cir. 2002)).

Before the court dismisses a *pro se* complaint for failure to state a claim, the court must provide the plaintiff with a statement of the complaint's deficiencies and give the plaintiff leave to amend the complaint unless it is absolutely clear that the deficiencies of the complaint cannot be cured by amendment. *Rouse v. United States Dep't of State*, 548 F.3d 871, 881-82 (9<sup>th</sup> Cir. 2008).

### **DISCUSSION**

Tyco/Precision moves to dismiss Plaintiff's claims on the grounds that (1) they are "barred by *res judicata*,"<sup>1</sup> (2) Plaintiff failed to exhaust his administrative remedies, and (3) Plaintiff's claims for age and disability discrimination under Oregon law are time-barred.

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<sup>1</sup> Courts now generally refer to *res judicata* as claim preclusion, the Court, therefore, refers to this doctrine as claim preclusion in its analysis. See *Cell Therapeutics, Inc. v. Lash Group, Inc.*, No. 08-35619, 2009 WL 3837544, at \*8 (9<sup>th</sup> Cir. Nov. 18, 2009).

**I. Plaintiff's claims are barred by claim preclusion.**

Under the doctrine of claim preclusion, a final judgment on the merits rendered by a court of competent jurisdiction is conclusive and constitutes an absolute bar to a subsequent identical action against the same defendant or those in privity with that defendant. *Montana v. United States*, 440 U.S. 147, 153 (1979). A claim or cause of action is identical when "the suits arise out of the same transactional nucleus of facts." *Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 406 (9<sup>th</sup> Cir. 1985). See also *Harris v. Jacobs*, 621 F.2d 341, 343 (9<sup>th</sup> Cir. 1980).

"Claim preclusion 'applies when there is (1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between the parties.'" *Cell Therapeutics*, 2009 WL 3837544, at \*8 (quoting *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9<sup>th</sup> Cir. 2002)).

The Ninth Circuit has held as to the identity of claims element that "[c]laim preclusion . . . bars any subsequent suit on claims that were raised or could have been raised in a prior action." *Cell Therapeutics*, 2009 WL 3837544, at \*8 (citing *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9<sup>th</sup> Cir. 2002)). "'It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could have

been brought.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1078 (9<sup>th</sup> Cir. 2003)(quoting *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905 (9<sup>th</sup> Cir. 1998)).

In this action, Plaintiff alleges Tyco/Precision discriminated against him on the basis of his race, color, and/or national origin; disability; and age while Plaintiff was an employee. Plaintiff's claims in this case arise from the same set of facts as the claims in Plaintiff's prior actions, and, therefore, Plaintiff could have asserted all of these claims in his prior actions.

Plaintiff notes he moved to amend his Complaint in 07-CV-953 to supplement his claims for retaliation based on race, color, and/or national origin to include events that occurred between November 29 and December 5, 2007. On January 2, 2008, the Court denied Plaintiff's Motion on the ground that Plaintiff had not exhausted his administrative remedies as to these allegations, and, therefore, the Court lacked jurisdiction to address them. Plaintiff, however, did not file a BOLI complaint addressing these allegations until May 2008 after the close of discovery in his prior cases. Moreover, Plaintiff did not request a stay of the pending litigation to allow BOLI to process his new allegations nor did he request expedited relief from BOLI or file a complaint with BOLI in an expeditious manner. Thus, the Court

concludes Plaintiff could have raised these issues in his prior actions and failed to act diligently in an effort to do so.

In addition, Plaintiff did not seek leave of the Court in either prior action to add claims for disability or age discrimination even though the acts giving rise to these claims occurred before the close of discovery and well before the Court's issuance of Opinions and Orders that resolved the Motions for Summary Judgment in favor of Tyco/Precision.

On this record, the Court concludes Plaintiff's current action is barred by claim preclusion.

**II. Plaintiff failed to exhaust his claims for violation of the ADA and ADEA.**

Even if Plaintiff's claims for violation of the ADA and ADEA were not barred by claim preclusion, the Court concludes Plaintiff has not exhausted his administrative remedies as to those claims, and, therefore, this Court lacks subject-matter jurisdiction over them.

To bring a claim in federal court under the ADA or the ADEA, "a plaintiff must first exhaust administrative remedies by filing a timely charge with the Equal Employment Opportunity Commission (EEOC) or the state agency to whom investigative authority has been delegated." *Barrett v. Marion County*, Civ. No. 07-6337-TC, 2008 WL 4221544, at \*1 (D. Or. Sept. 15, 2008)(citing 42 U.S.C. § 12117(a) and 29 U.S.C. § 626(d)). "[T]he administrative charge requirement serves the important purposes of giving the charged

party notice of the claim and narrowing the issues for prompt adjudication and decision." *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9<sup>th</sup> Cir. 2002).

**A. Plaintiff did not allege discrimination or retaliation based on age or disability in his BOLI complaint.**

As noted, Plaintiff stated in his BOLI charge preceding this action that "I allege unlawful employment discrimination based on race/color, and/or whistleblowing, and/or retaliation for opposing unlawful employment practices." Plaintiff contends he also asserted disability discrimination by stating in the narrative accompanying his charge that he is "disabled." Nevertheless, Plaintiff did not allege any discrimination or retaliation based on his disability.

Plaintiff also contends he asserted age discrimination in his May 2008 BOLI complaint by later asking BOLI to "please also look into 72 people was [sic] let go by Tyco on December 9, 2008. It was statistically imbalance [sic]; more people over forty years of age were laid off." In his statement, however, Plaintiff does not allege age discrimination against him or set out any specific facts related to him. The Court, therefore, concludes Plaintiff did not allege discrimination or retaliation based on age or disability in his BOLI complaint.

**B. Plaintiff's ADA and ADEA claims could not reasonably "grow out of" his BOLI claims for discrimination based on race, color, and/or national origin.**

"Subject matter jurisdiction extends to all claims of discrimination that reasonably could grow out of the [EEOC or state administrative agency] charge." *Vasquez v. Los Angeles County*, 349 F.3d 634, 644 (9<sup>th</sup> Cir. 2004).

To determine whether a claim of discrimination reasonably could "grow out of" an EEOC or state administrative agency charge, the court must decide whether the claim "is reasonably related to the . . . charge." *Id.* The court may consider "such factors as the alleged basis of the discrimination, the dates of the discriminatory acts specified within the charge, perpetrators of discrimination named in the charge, and any locations at which discrimination is alleged to have occurred." *Id.*

As noted, in his May 2008 BOLI charge Plaintiff alleged discrimination and retaliation based on race, color, and/or national origin. The Ninth Circuit has held charges of disability discrimination cannot reasonably be expected to grow out of charges of race, color, religion, sex, national origin, and/or age discrimination. *Leong v. Potter*, 347 F.3d 1117, 1122 (9<sup>th</sup> Cir. 2003).

In *Leong* the plaintiff filed an EEOC charge in which he alleged discrimination based on race, color, religion, sex,

national origin, and/or age. *Id.* at 1121. The plaintiff then filed an action in federal court in which he also alleged he was discriminated against on the basis of a disability. *Id.* The Ninth Circuit held the plaintiff had not exhausted his administrative remedies as to his disability claim:

[The plaintiff's] disability claim relies on a different theory and a different statute than his other claims. Disability discrimination was not investigated by the EEOC, and such an investigation could not have been reasonably expected to grow out of [the plaintiff's] charges. . . . Furthermore, [the plaintiff's] charges do not provide the [defendant] adequate notice of his disability discrimination claim. . . . A decision that an EEOC complaint with no mention whatsoever of disability is "like or reasonably related to" [the plaintiff's] disability claim would reduce the exhaustion requirement to a formality. Although "the EEOC charge does not demand procedural exactness," *Sosa*, 920 F.2d at 1458, it requires something more than [the plaintiff] provided. Therefore, the district court did not err in finding that [the plaintiff] failed to exhaust his administrative remedies for his claim.

*Id.* at 1122.

Here, as in *Leong*, Plaintiff's ADA and ADEA claims rely on different statutes than his claims regarding race, color, and/or national origin. In addition, there is not any evidence that BOLI investigated discrimination against Plaintiff based on disability or age. Thus, the BOLI charge does not provide adequate notice to Tyco/Precision of Plaintiff's disability or age-discrimination claims.

On this record, the Court concludes Plaintiff failed to

exhaust his administrative remedies as to his ADA and ADEA claims, and, therefore, the Court lacks subject-matter jurisdiction over these claims.

**III. Plaintiff's claims for age and disability discrimination under Oregon law are time-barred.**

Oregon Revised Statute § 659A.875 requires:

(1) a civil action . . . alleging an unlawful employment practice must be commenced within one year after the occurrence of the unlawful employment practice unless a complaint has been timely filed [with BOLI] under ORS 659A.820.

(2) A person who has filed a complaint under ORS 659A.820 must commence a civil action . . . within 90 days after a 90-day notice is mailed to the complainant.

Plaintiff's May 2008 BOLI charge did not sufficiently allege disability or age discrimination. As noted, none of Tyco/Precision's actions that form the basis of Plaintiff's disability and age-discrimination claims occurred later than Plaintiff's resignation on April 23, 2008. Plaintiff filed this action on June 19, 2009, which is more than one year after April 23, 2008.

Accordingly, the Court concludes Plaintiff's claims for discrimination based on age or disability in violation of Oregon law are time-barred.

**IV. Tyco/Precision's request for injunctive relief.**

Tyco/Precision requests the Court to issue an order permanently enjoining Plaintiff from filing any further



employment discrimination or retaliation claims under state or federal law against Tyco/Precision.

The Ninth Circuit has held

[t]he doctrines of collateral estoppel and *res judicata* ordinarily provide adequate assurance that one court's resolution of a controversy will be respected by other courts. Nevertheless, under the All Writs Act, 28 U.S.C. § 1651, district courts do have the power to reinforce the effects of these doctrines by issuing an injunction against repetitive litigation.

*Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9<sup>th</sup> Cir. 1983).

Plaintiff has filed three actions relating to his employment with Tyco/Precision, all of which have now been dismissed by this Court. Because Plaintiff has not been employed by Tyco/Precision since April 23, 2008, and the Court has determined Plaintiff's claims relating to discrimination in his employment by Tyco/Precision are barred by claim preclusion and/or time barred, the Court enters a permanent injunction as follows: Plaintiff is hereby permanently enjoined from relitigating or attempting to relitigate his claims against Tyco/Precision by filing any further actions in this Court against Tyco/Precision, its respective agents, or any other entity in privity with Tyco/Precision concerning the acts, omissions, or events related to or arising out of the matters set out in the present action or in Case Nos. 06-CV-1810-BR and 07-CV-953-BR.

## **V. Attorneys' Fees and Costs.**

Tyco/Precision requests attorneys' fees and costs incurred in filing its Motion to Dismiss because Plaintiff refused to voluntarily dismiss this action even after Tyco/Precision conferred with Plaintiff.

### **A. Attorneys' Fees**

Tyco/Precision relies on 28 U.S.C. § 1927 and the Court's inherent power to impose sanctions as set out in *Fink v. Gomez*, 239 F.3d 989 (9<sup>th</sup> Cir. 2001), to support its request for attorneys' fees.

Section 1927 explicitly applies only to attorneys who multiply "proceedings unreasonably and vexatiously" and Tyco/Precision does not offer any authority that it applies to *pro se* plaintiffs. Plaintiff is not an attorney and has conducted all of his actions *pro se*. Accordingly, the Court concludes § 1927 does not provide the Court with authority to sanction Plaintiff in this matter.

In *Fink*, however, the Ninth Circuit addressed the Court's inherent power to issue sanctions against an attorney. The Ninth Circuit held inherent-power "sanctions are available if the court specifically finds bad faith or conduct tantamount to bad faith. Sanctions are available for a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an

improper purpose." *Id.* at 994.

As noted, Plaintiff has proceeded *pro se* in all of his actions. Although his repetitious filings have been determined to lack merit, there is not any evidence that Plaintiff brought these actions in bad faith or that he engaged in any action tantamount to bad faith.

Now that the Court has permanently enjoined Plaintiff from bringing another action, however, the Court hereby notifies Plaintiff that the Court will impose monetary sanctions against him, including attorneys' fees, if Plaintiff does not comply with the injunction.

Accordingly, the Court denies Tyco/Precision's request for attorneys' fees under *Fink*.

#### **B. Costs**

Federal Rule of Civil Procedure 54(d)(1) "creates a presumption in favor of awarding costs to a prevailing party, but vests in the district court discretion to refuse to award costs." *Ass'n of Mexican-American Educators v. State of Cal.*, 231 F.3d 572, 591 (9<sup>th</sup> Cir. 2000). The court's discretion, however, is not unlimited. A district court must specify appropriate reasons for a refusal to award costs. *Id.*

To overcome the presumption in favor of awarding costs to the prevailing party, the court must make specific findings that the "case is not 'ordinary' and . . . it would be

inappropriate or inequitable to award costs." *Id.* at 593. Appropriate reasons for a district court to deny costs to a prevailing party include the losing party's limited financial resources and any chilling effect a high award of costs might have on future litigants. *Id.* at 592. The losing party has the burden to prove that costs should not be awarded based on the party's inability to pay. *Save Our Valley v. Sound Transit*, 335 F.3d 932, 945 (9<sup>th</sup> Cir. 2003).

The Court is aware from litigation regarding the cost bills in Plaintiff's other two cases that Plaintiff has limited means. Tyco/Precision did not submit any evidence as to the amount of costs it incurred in this matter. The Court, therefore, cannot assess whether the costs in this matter are so high as to have a chilling effect on future litigants and cannot balance Plaintiff's means with the amount of costs.

Accordingly, the Court declines to address this issue until Tyco/Precision files a cost bill in due course.

#### **CONCLUSION**

For these reasons, the Court **GRANTS in part** and **DENIES in part** Tyco/Precision's Motion (#6) to Dismiss Plaintiff's Amended Complaint Pursuant to FRCP 12(b)(6) and 12(f) and Request for Attorneys' Fees and Injunctive Relief as follows:

1. **GRANTS** Tyco/Precision's Motion to Dismiss,

2. **GRANTS** Tyco/Precision's request for injunctive relief as set out in this Opinion and Order,
3. **DENIES** Tyco/Precision's request for attorneys' fees, and
4. **DENIES** Tyco/Precision's request for costs with leave to renew its request in a cost bill in due course.

IT IS SO ORDERED.

DATED this 20<sup>th</sup> day of November, 2009.

/s/ Anna J. Brown

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ANNA J. BROWN  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

VINCENT TRAN,

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**BROWN, Judge.**

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**BACKGROUND**

Plaintiff Vincent Tran is a 41-year-old Vietnamese man who is missing most of his left arm from the elbow down. In 1992 Precision Interconnect hired Plaintiff as a Senior CAD Operator. In 1996 Precision Interconnect promoted Plaintiff to the position of Design/Drafter. In 1999 Precision Interconnect was acquired by Tyco Healthcare. On April 23, 2008, Plaintiff resigned his employment with Tyco/Precision.

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On February 14, 2008, Plaintiff filed a third Amended  
Complaint in which he alleged Tyco/Precision discriminated  
against him on the basis of his national origin in violation of  
Title VII, 42 U.S.C. § 2000e-2; 42 U.S.C. § 1981; and Oregon  
Revised Statute § 659A.030. Plaintiff also alleged  
Tyco/Precision retaliated against him for filing a BOLI complaint  
and Case No. 06-CV-1810-BR.

On May 27, 2008, Tyco/Precision filed a Motion for Summary  
Judgment as to all of Plaintiff's claims.

On September 29, 2008, the Court issued an Opinion and Order  
in which it granted Tyco/Precision's Motion for Summary Judgment  
and entered a Judgment dismissing the matter with prejudice.

Although Plaintiff appealed the dismissal of this action,  
the Ninth Circuit also dismissed the appeal for lack of  
prosecution in May 2009.

**III. The present action (09-CV-692-BR).**

In May 2008 Plaintiff filed a complaint with BOLI in which he alleged "unlawful employment discrimination based on race/color, and/or whistleblowing, and/or retaliation for opposing unlawful employment practices."

On June 18, 2009, Plaintiff filed a Complaint in this action, 09-CV-692-BR, in which he alleged Tyco/Precision discriminated against him in violation of 42 U.S.C. § 1981; Title VII, 42 U.S.C. § 2000(e)(2); and (3) Oregon Revised Statute § 659A.030 on the basis of his race, color, and/or national origin and in retaliation for filing his previous actions and complaints with BOLI.

On July 27, 2009, Plaintiff filed an Amended Complaint in which he alleges Tyco/Precision discriminated against him in violation of 42 U.S.C. § 1981; Title VII; and Oregon Revised Statute § 659A.030 on the basis of his race, color, and/or national origin and in retaliation for filing his previous actions and for complaining to BOLI. Plaintiff also alleges Tyco/Precision discriminated against him in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1); the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a); and (3) Oregon Revised Statute § 659A.112(1). Finally, Plaintiff alleges Tyco/Precision unlawfully constructively discharged him on April 23, 2008.

On August 11, 2009, Tyco/Precision filed a Motion to Dismiss in which it seeks an order dismissing all of Plaintiff's claims on the grounds that they are barred by claim preclusion, Plaintiff failed to exhaust his administrative remedies, and/or Plaintiff's claims are time-barred. Tyco/Precision also seeks attorneys' fees and an order enjoining Plaintiff from filing any further actions based on his employment with Tyco/Precision.

### STANDARD

Dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is proper only if the pleadings fail to allege enough facts so as to demonstrate a plausible entitlement to relief. *Bell Atlantic v. Twombly*, 550 U.S. 544, 555-56 (2007).

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

*Id.* at 1964-65. In making this determination, the court must accept all allegations of material fact as true and construe the allegations in the light most favorable to the nonmoving party. *Abagninin v. AMVAC Chem. Corp.* 545 F.3d 733, 737 (9<sup>th</sup> Cir. 2008).

In actions involving plaintiffs proceeding *pro se*, the court construes the pleadings liberally and affords the plaintiff the benefit of any doubt. *Aguasin v. Mukasey*, No. 05-70521, 2008 WL 4750618, at \*1 (9<sup>th</sup> Cir. Oct. 30, 2008)(citing *Agyeman v. I.N.S.*, 296 F.3d 871, 878 (9<sup>th</sup> Cir. 2002)).

Before the court dismisses a *pro se* complaint for failure to state a claim, the court must provide the plaintiff with a statement of the complaint's deficiencies and give the plaintiff leave to amend the complaint unless it is absolutely clear that the deficiencies of the complaint cannot be cured by amendment. *Rouse v. United States Dep't of State*, 548 F.3d 871, 881-82 (9<sup>th</sup> Cir. 2008).

### **DISCUSSION**

Tyco/Precision moves to dismiss Plaintiff's claims on the grounds that (1) they are "barred by *res judicata*,"<sup>1</sup> (2) Plaintiff failed to exhaust his administrative remedies, and (3) Plaintiff's claims for age and disability discrimination under Oregon law are time-barred.

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<sup>1</sup> Courts now generally refer to *res judicata* as claim preclusion, the Court, therefore, refers to this doctrine as claim preclusion in its analysis. See *Cell Therapeutics, Inc. v. Lash Group, Inc.*, No. 08-35619, 2009 WL 3837544, at \*8 (9<sup>th</sup> Cir. Nov. 18, 2009).

**I. Plaintiff's claims are barred by claim preclusion.**

Under the doctrine of claim preclusion, a final judgment on the merits rendered by a court of competent jurisdiction is conclusive and constitutes an absolute bar to a subsequent identical action against the same defendant or those in privity with that defendant. *Montana v. United States*, 440 U.S. 147, 153 (1979). A claim or cause of action is identical when "the suits arise out of the same transactional nucleus of facts." *Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 406 (9<sup>th</sup> Cir. 1985). See also *Harris v. Jacobs*, 621 F.2d 341, 343 (9<sup>th</sup> Cir. 1980).

"Claim preclusion 'applies when there is (1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between the parties.'" *Cell Therapeutics*, 2009 WL 3837544, at \*8 (quoting *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9<sup>th</sup> Cir. 2002)).

The Ninth Circuit has held as to the identity of claims element that "[c]laim preclusion . . . bars any subsequent suit on claims that were raised or could have been raised in a prior action." *Cell Therapeutics*, 2009 WL 3837544, at \*8 (citing *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9<sup>th</sup> Cir. 2002)). "'It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could have

been brought.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1078 (9<sup>th</sup> Cir. 2003)(quoting *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905 (9<sup>th</sup> Cir. 1998)).

In this action, Plaintiff alleges Tyco/Precision discriminated against him on the basis of his race, color, and/or national origin; disability; and age while Plaintiff was an employee. Plaintiff's claims in this case arise from the same set of facts as the claims in Plaintiff's prior actions, and, therefore, Plaintiff could have asserted all of these claims in his prior actions.

Plaintiff notes he moved to amend his Complaint in 07-CV-953 to supplement his claims for retaliation based on race, color, and/or national origin to include events that occurred between November 29 and December 5, 2007. On January 2, 2008, the Court denied Plaintiff's Motion on the ground that Plaintiff had not exhausted his administrative remedies as to these allegations, and, therefore, the Court lacked jurisdiction to address them. Plaintiff, however, did not file a BOLI complaint addressing these allegations until May 2008 after the close of discovery in his prior cases. Moreover, Plaintiff did not request a stay of the pending litigation to allow BOLI to process his new allegations nor did he request expedited relief from BOLI or file a complaint with BOLI in an expeditious manner. Thus, the Court



concludes Plaintiff could have raised these issues in his prior actions and failed to act diligently in an effort to do so.

In addition, Plaintiff did not seek leave of the Court in either prior action to add claims for disability or age discrimination even though the acts giving rise to these claims occurred before the close of discovery and well before the Court's issuance of Opinions and Orders that resolved the Motions for Summary Judgment in favor of Tyco/Precision.

On this record, the Court concludes Plaintiff's current action is barred by claim preclusion.

**II. Plaintiff failed to exhaust his claims for violation of the ADA and ADEA.**

Even if Plaintiff's claims for violation of the ADA and ADEA were not barred by claim preclusion, the Court concludes Plaintiff has not exhausted his administrative remedies as to those claims, and, therefore, this Court lacks subject-matter jurisdiction over them.

To bring a claim in federal court under the ADA or the ADEA, "a plaintiff must first exhaust administrative remedies by filing a timely charge with the Equal Employment Opportunity Commission (EEOC) or the state agency to whom investigative authority has been delegated." *Barrett v. Marion County*, Civ. No. 07-6337-TC, 2008 WL 4221544, at \*1 (D. Or. Sept. 15, 2008)(citing 42 U.S.C. § 12117(a) and 29 U.S.C. § 626(d)). "[T]he administrative charge requirement serves the important purposes of giving the charged

party notice of the claim and narrowing the issues for prompt adjudication and decision." *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9<sup>th</sup> Cir. 2002).

**A. Plaintiff did not allege discrimination or retaliation based on age or disability in his BOLI complaint.**

As noted, Plaintiff stated in his BOLI charge preceding this action that "I allege unlawful employment discrimination based on race/color, and/or whistleblowing, and/or retaliation for opposing unlawful employment practices." Plaintiff contends he also asserted disability discrimination by stating in the narrative accompanying his charge that he is "disabled." Nevertheless, Plaintiff did not allege any discrimination or retaliation based on his disability.

Plaintiff also contends he asserted age discrimination in his May 2008 BOLI complaint by later asking BOLI to "please also look into 72 people was [sic] let go by Tyco on December 9, 2008. It was statistically imbalance [sic]; more people over forty years of age were laid off." In his statement, however, Plaintiff does not allege age discrimination against him or set out any specific facts related to him. The Court, therefore, concludes Plaintiff did not allege discrimination or retaliation based on age or disability in his BOLI complaint.

**B. Plaintiff's ADA and ADEA claims could not reasonably "grow out of" his BOLI claims for discrimination based on race, color, and/or national origin.**

"Subject matter jurisdiction extends to all claims of discrimination that reasonably could grow out of the [EEOC or state administrative agency] charge." *Vasquez v. Los Angeles County*, 349 F.3d 634, 644 (9<sup>th</sup> Cir. 2004).

To determine whether a claim of discrimination reasonably could "grow out of" an EEOC or state administrative agency charge, the court must decide whether the claim "is reasonably related to the . . . charge." *Id.* The court may consider "such factors as the alleged basis of the discrimination, the dates of the discriminatory acts specified within the charge, perpetrators of discrimination named in the charge, and any locations at which discrimination is alleged to have occurred." *Id.*

As noted, in his May 2008 BOLI charge Plaintiff alleged discrimination and retaliation based on race, color, and/or national origin. The Ninth Circuit has held charges of disability discrimination cannot reasonably be expected to grow out of charges of race, color, religion, sex, national origin, and/or age discrimination. *Leong v. Potter*, 347 F.3d 1117, 1122 (9<sup>th</sup> Cir. 2003).

In *Leong* the plaintiff filed an EEOC charge in which he alleged discrimination based on race, color, religion, sex,

national origin, and/or age. *Id.* at 1121. The plaintiff then filed an action in federal court in which he also alleged he was discriminated against on the basis of a disability. *Id.* The Ninth Circuit held the plaintiff had not exhausted his administrative remedies as to his disability claim:

[The plaintiff's] disability claim relies on a different theory and a different statute than his other claims. Disability discrimination was not investigated by the EEOC, and such an investigation could not have been reasonably expected to grow out of [the plaintiff's] charges. . . . Furthermore, [the plaintiff's] charges do not provide the [defendant] adequate notice of his disability discrimination claim. . . . A decision that an EEOC complaint with no mention whatsoever of disability is "like or reasonably related to" [the plaintiff's] disability claim would reduce the exhaustion requirement to a formality. Although "the EEOC charge does not demand procedural exactness," *Sosa*, 920 F.2d at 1458, it requires something more than [the plaintiff] provided. Therefore, the district court did not err in finding that [the plaintiff] failed to exhaust his administrative remedies for his claim.

*Id.* at 1122.

Here, as in *Leong*, Plaintiff's ADA and ADEA claims rely on different statutes than his claims regarding race, color, and/or national origin. In addition, there is not any evidence that BOLI investigated discrimination against Plaintiff based on disability or age. Thus, the BOLI charge does not provide adequate notice to Tyco/Precision of Plaintiff's disability or age-discrimination claims.

On this record, the Court concludes Plaintiff failed to

exhaust his administrative remedies as to his ADA and ADEA claims, and, therefore, the Court lacks subject-matter jurisdiction over these claims.

**III. Plaintiff's claims for age and disability discrimination under Oregon law are time-barred.**

Oregon Revised Statute § 659A.875 requires:

(1) a civil action . . . alleging an unlawful employment practice must be commenced within one year after the occurrence of the unlawful employment practice unless a complaint has been timely filed [with BOLI] under ORS 659A.820.

(2) A person who has filed a complaint under ORS 659A.820 must commence a civil action . . . within 90 days after a 90-day notice is mailed to the complainant.

Plaintiff's May 2008 BOLI charge did not sufficiently allege disability or age discrimination. As noted, none of Tyco/Precision's actions that form the basis of Plaintiff's disability and age-discrimination claims occurred later than Plaintiff's resignation on April 23, 2008. Plaintiff filed this action on June 19, 2009, which is more than one year after April 23, 2008.

Accordingly, the Court concludes Plaintiff's claims for discrimination based on age or disability in violation of Oregon law are time-barred.

**IV. Tyco/Precision's request for injunctive relief.**

Tyco/Precision requests the Court to issue an order permanently enjoining Plaintiff from filing any further

employment discrimination or retaliation claims under state or federal law against Tyco/Precision.

The Ninth Circuit has held

[t]he doctrines of collateral estoppel and *res judicata* ordinarily provide adequate assurance that one court's resolution of a controversy will be respected by other courts. Nevertheless, under the All Writs Act, 28 U.S.C. § 1651, district courts do have the power to reinforce the effects of these doctrines by issuing an injunction against repetitive litigation.

*Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9<sup>th</sup> Cir. 1983).

Plaintiff has filed three actions relating to his employment with Tyco/Precision, all of which have now been dismissed by this Court. Because Plaintiff has not been employed by Tyco/Precision since April 23, 2008, and the Court has determined Plaintiff's claims relating to discrimination in his employment by Tyco/Precision are barred by claim preclusion and/or time barred, the Court enters a permanent injunction as follows: Plaintiff is hereby permanently enjoined from relitigating or attempting to relitigate his claims against Tyco/Precision by filing any further actions in this Court against Tyco/Precision, its respective agents, or any other entity in privity with Tyco/Precision concerning the acts, omissions, or events related to or arising out of the matters set out in the present action or in Case Nos. 06-CV-1810-BR and 07-CV-953-BR.

## **V. Attorneys' Fees and Costs.**

Tyco/Precision requests attorneys' fees and costs incurred in filing its Motion to Dismiss because Plaintiff refused to voluntarily dismiss this action even after Tyco/Precision conferred with Plaintiff.

### **A. Attorneys' Fees**

Tyco/Precision relies on 28 U.S.C. § 1927 and the Court's inherent power to impose sanctions as set out in *Fink v. Gomez*, 239 F.3d 989 (9<sup>th</sup> Cir. 2001), to support its request for attorneys' fees.

Section 1927 explicitly applies only to attorneys who multiply "proceedings unreasonably and vexatiously" and Tyco/Precision does not offer any authority that it applies to *pro se* plaintiffs. Plaintiff is not an attorney and has conducted all of his actions *pro se*. Accordingly, the Court concludes § 1927 does not provide the Court with authority to sanction Plaintiff in this matter.

In *Fink*, however, the Ninth Circuit addressed the Court's inherent power to issue sanctions against an attorney. The Ninth Circuit held inherent-power "sanctions are available if the court specifically finds bad faith or conduct tantamount to bad faith. Sanctions are available for a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an

improper purpose." *Id.* at 994.

As noted, Plaintiff has proceeded *pro se* in all of his actions. Although his repetitious filings have been determined to lack merit, there is not any evidence that Plaintiff brought these actions in bad faith or that he engaged in any action tantamount to bad faith.

Now that the Court has permanently enjoined Plaintiff from bringing another action, however, the Court hereby notifies Plaintiff that the Court will impose monetary sanctions against him, including attorneys' fees, if Plaintiff does not comply with the injunction.

Accordingly, the Court denies Tyco/Precision's request for attorneys' fees under *Fink*.

#### **B. Costs**

Federal Rule of Civil Procedure 54(d)(1) "creates a presumption in favor of awarding costs to a prevailing party, but vests in the district court discretion to refuse to award costs." *Ass'n of Mexican-American Educators v. State of Cal.*, 231 F.3d 572, 591 (9<sup>th</sup> Cir. 2000). The court's discretion, however, is not unlimited. A district court must specify appropriate reasons for a refusal to award costs. *Id.*

To overcome the presumption in favor of awarding costs to the prevailing party, the court must make specific findings that the "case is not 'ordinary' and . . . it would be



inappropriate or inequitable to award costs." *Id.* at 593. Appropriate reasons for a district court to deny costs to a prevailing party include the losing party's limited financial resources and any chilling effect a high award of costs might have on future litigants. *Id.* at 592. The losing party has the burden to prove that costs should not be awarded based on the party's inability to pay. *Save Our Valley v. Sound Transit*, 335 F.3d 932, 945 (9<sup>th</sup> Cir. 2003).

The Court is aware from litigation regarding the cost bills in Plaintiff's other two cases that Plaintiff has limited means. Tyco/Precision did not submit any evidence as to the amount of costs it incurred in this matter. The Court, therefore, cannot assess whether the costs in this matter are so high as to have a chilling effect on future litigants and cannot balance Plaintiff's means with the amount of costs.

Accordingly, the Court declines to address this issue until Tyco/Precision files a cost bill in due course.

### CONCLUSION

For these reasons, the Court **GRANTS in part** and **DENIES in part** Tyco/Precision's Motion (#6) to Dismiss Plaintiff's Amended Complaint Pursuant to FRCP 12(b)(6) and 12(f) and Request for Attorneys' Fees and Injunctive Relief as follows:

1. **GRANTS** Tyco/Precision's Motion to Dismiss,

2. **GRANTS** Tyco/Precision's request for injunctive relief as set out in this Opinion and Order,
3. **DENIES** Tyco/Precision's request for attorneys' fees, and
4. **DENIES** Tyco/Precision's request for costs with leave to renew its request in a cost bill in due course.

IT IS SO ORDERED.

DATED this 20<sup>th</sup> day of November, 2009.

/s/ Anna J. Brown

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ANNA J. BROWN  
United States District Judge